

November 12, 1998

Re: Call-in Technical Inquiry 0425 – Responsible Official in Floodplain Actions and EAs involving Regulated Floodplains

Dear NEPA User:

This letter is in response to your October 21, 1998 request for guidance on who is the GSA "Responsible Official" for actions involving siting in a regulated floodplain (100-year, or 500-year for critical actions), when siting in the floodplain is the only practicable alternative. Specifically, you wanted to know:

- 1) Who is responsible for determining that siting in a regulated floodplain is the only practicable alternative when the proposed action does not require an environmental assessment (EA) or environmental impact statement (EIS) under the National Environmental Policy Act (NEPA)?
- 2) If the Responsible Official in question (1) above is the Commissioner of the Public Buildings Service (PBS), who acts on behalf of the Commissioner when "only practicable alternative" determinations are sent to his office for review?
- 3) For an EA resulting in a Finding of No Significant Impact (FONSI) in which the proposed action involves siting in a regulated floodplain, does the involvement of a regulated floodplain require that the FONSI be signed by the Commissioner, PBS, rather than the Regional Administrator (RA) if the answer to (1) above is the PBS Commissioner?

You also wanted to know why the PBS Commissioner was not mentioned in the second scenario in the NEPA Call-In Factsheet, "When Siting in the Floodplain is the Only Practicable Alternative," and why certain steps of the Federal Emergency Management Agency (FEMA) eight-step process for siting in a floodplain are published in the order they are.

## **SUMMARY OF FINDINGS**

For question 1) the Administrator has delegated responsibility for determining whether siting an action in a regulated floodplain is the only practicable alternative to the RA when the action involves regional disposal of real property or lease acquisitions. In all other cases, the PBS Commissioner is responsible for the determination. For question 2), the PBS Commissioner is responsible for reviewing all findings of only practicable alternative and is prohibited from further delegation of this authority. For question 3) RAs are normally the responsible official for EAs that result in a FONSI even when floodplains are involved since the PBS Commissioner should have already reviewed the floodplain aspect of the EA by the time the FONSI is prepared. For question 4) the PBS Commissioner was not mentioned in the factsheet scenario in question due to its emphasis on the FEMA eight-step process and not on GSA's delegations of authority. Finally, NEPA Call-In is providing guidance from FEMA stating why Step 2 of the eight-step process must come before the rest of the process. Our detailed findings are presented below.

## **DETAILED FINDINGS**

In regards to your first question, NEPA Call-In reviewed GSA Order ADM 1095.2 (Change 1, October 31, 1983), "Consideration of Floodplains and Wetlands in Decisionmaking," for the delegation of responsibilities pertaining to floodplain actions. Section 3, "Responsibilities," subpart "a". states, "The

Head of the Service [Commissioner] or Staff Office [Assistant Commissioner] or Regional Administrator under whose jurisdiction the action is being planned, hereinafter referred to as the responsible official, is responsible for the implementation of this order." This means that the Commissioner, Assistant Commissioner, and the RA are the responsible official for implementing the provisions of ADM 1095.2.

We then reviewed subpart "b" which states:

"The responsible official shall take no action in or affecting floodplains or wetlands unless the action has been determined to be the only practicable alternative. The Administrator delegates this determination to the following officials based upon the nature of the actions:

1. The Associate Administrator for Operations [This office was abolished August 30, 1988 by GSA Order ADM 5440.391 and its function of regional oversight was transferred to the Office of the Administrator] and thence to the Regional Administrators in cases involving regional disposal of real property or lease acquisitions to fulfill Federal space requirements;
2. The Commissioner, Federal Property Resources Service when an action affects the service's program, except in cases involving regional disposal of real property [The office of Federal Property Resources Service was abolished January 4, 1995 by GSA Order ADM 5440.445 and its functions absorbed into the Public Buildings Service. NEPA Call-In could not locate any office within PBS that specifically inherited this responsibility. Therefore, NEPA Call-In assumes the responsibility lies with the PBS Commissioner]; and
3. The Commissioner, PBS, in all cases excepting (1) and (2), above.
4. This approval authority may not be redelegated."

Therefore, in cases involving regional disposal of real property or lease acquisitions, the Administrator has delegated responsibility for determining whether siting an action in a regulated floodplain is the only practicable alternative to the RA. In all other cases, the Administrator has delegated responsibility for determining whether siting an action in a regulated floodplain is the only practicable alternative to the PBS Commissioner.

NEPA Call-In then reviewed subpart "c" which states:

"The Commissioner, PBS, who acts for the Administrator on environmental matters, shall review and monitor GSA's programs and actions which may affect floodplains and wetlands."

This delegation means once an RA determines an action in a regulated floodplain is the only practicable alternative, the PBS Commissioner shall review and monitor the action on behalf of the Administrator. This concept is reinforced in subpart d. which states:

"When determined by one of the designated officials in b(1) or (2) above, that an action is the only practical alternative, a copy of the signed determination shall be forwarded to the commissioner, PBS, for review, along with supporting documentation used in the decisionmaking process to ensure compliance with published regulations."

In regards to your second question about who acts for the PBS Commissioner when only practicable alternative decisions and supporting documentation are forwarded to his office for review, NEPA Call-

In reviewed Section 3(b)(4), which states, "This approval authority may not be redelegated." Although GSA Order ADM 1095.2 is out of date and references offices which no longer exist, it still must be used for floodplain decisionmaking within GSA. GSA National Office is working toward amending the ADM, which will be published with an accompanying Desk Guide, pending issuance of a revised Executive Order on floodplain management by the President.

In regards to your third question about who is the responsible official for signing a FONSI under NEPA when the action involves a regulated floodplain, the RA or PBS Commissioner, NEPA Call-In reviewed the PBS NEPA Desk Guide, Interim Guidance, September 1998. Section 2.3, "*The Responsible GSA Official*," which states:

"For actions requiring an EA or EIS, the responsible GSA official is always the RA, except where an action is under the direct authority of a Head of Service [Commissioner] or of a Business Line [Assistant Commissioner], the Commissioner, PBS, or the Administrator. For actions that are categorically excluded (CATEX) from extensive NEPA review, the responsible GSA official is the decisionmaker who approves the action."

Therefore, RAs would normally be the responsible official for EAs. If an EA involving a regulated floodplain results in a FONSI, the final authority for its review would still be the RA under whose jurisdiction the action falls, unless the action is under the direct authority of an Assistant Commissioner, Commissioner, or the Administrator. The PBS Commissioner would not be required to review the EA and FONSI if it involves the regulated floodplain because he would have already reviewed the finding of no practicable alternative floodplain determination under ADM 1095.2, which would have to be done prior to completion of the EA/FONSI. This does not preclude the PBS Commissioner from exercising his authority and requesting to review an EA/FONSI, however.

In a follow-up question you asked, if the PBS Commissioner is the final reviewer of only practicable alternative floodplain determinations, then why was he not mentioned in the example scenario on pages 5 and 6 of the NEPA Call-In Factsheet, "When siting in the floodplain is the only practicable alternative," September, 1997? NEPA Call-In reviewed the factsheet and scenario in question and determined the purpose of the scenarios is to provide a general overview of the FEMA eight-step process for siting in a regulated floodplain when this is the only practicable alternative, as outlined in FEMA's "Further Advice on Executive Order 11988, Floodplain Management," rather than to explain GSA's delegations of authority. This item will be kept on file in the NEPA Call-In database should the factsheet warrant revision, pending the issuance by the President of the revised Executive Order 11988 and GSA's corresponding revised floodplain orders and accompanying Desk Guide.

Finally, you wanted to know why in the FEMA eight-step process does Step 2, "Early Public Review," come before Step 3, "Identify and evaluate practicable alternatives to locating in the base floodplain" and Step 4, "Identify the impacts of the proposed action." NEPA Call-In reviewed FEMA's "Further advise on Executive Order 11988, Floodplain Management," which contains guidance on the FEMA eight-step process." Part IV(C), "What Constitutes Public Notice?" (enclosed) states:

"Step 2 requires the Federal agencies to notify and to involve the public. An agency should notify or require notification of the public at the earliest possible time, which means as soon as a proposed action which would be located in or affect a floodplain can be identified. Step 1 always requires a determination of whether a proposed action is in or affects a floodplain. It is logical, therefore, that notice of such determinations, whether accomplished by using a FEMA map or other resources or by assumption, follows immediately. Initial notice should always precede the beginning of the practicability and impact minimization analyses."

The objective is to keep the public informed of and involved in the practicable alternative analysis and impact analysis, and not to simply present the public with the findings after the analyses have been concluded.

The materials in this TI have been prepared for use by GSA employees and contractors and are made available at this site only to permit the general public to learn more about NEPA. The information is not intended to constitute legal advice or substitute for obtaining legal advice from an attorney licensed in your state and may or may not reflect the most current legal developments. Readers should also be aware that this response is based upon laws, regulations, and policies in place at the time it was prepared and that this response will not be updated to reflect changes to those laws, regulations and policies.

Sincerely,

(Original Signed)

NEPA Call-In Researcher